

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1233

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD MOORE and WILLIAM LAING,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT, WILLIAM LAING

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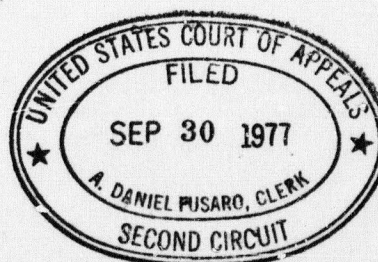


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QUESTIONS PRESENTED

1. Whether the Trial Court erred when it interrogated a non-concurring juror during jury poll rather than ordering further deliberation or dismissing the jury.
2. Whether the Trial Court erred in not granting a mistrial which was necessitated by the Assistant United States Attorney's repeated prejudicial questions and remarks made in the presence of the jury.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, : Submitted on
 : Original Record
-against- : Docket No. 77-1233
EDWARD MOORE and :
WILLIAM LAING, :
Defendants-Appellants. :
-----X

BRIEF FOR DEFENDANT-APPELLANT, WILLIAM LAING

STATEMENT OF THE CASE

A. Preliminary

This is an appeal by defendant, WILLIAM LAING, from a conviction after trial before the Honorable Mark Constantino, in the United States District Court for the Eastern District of New York on various charges including violations of 18 U.S. §495 (forged instruments); 18 U.S.C. §1708 (possession of stolen mail); 18 U.S.C. §371 (conspiracy) and 18 U.S.C. §1623 (perjury).

On the initial poll of the jury, a juror disagreed as to the verdict as to counts 1 and 8 under the indictment which charged defendant-appellant, LAING, with conspiracy and possession of stolen mail. Subsequent to the Court's interrogation in open court, that juror, after further deliberation switched his initial verdict of guilty to that of not guilty.

Defendant-appellant, WILLIAM LAING, was sentenced by the Court to two (2) years incarceration on this conviction and at present remains on bail pending the final determination of the instant appeal.

On May 9, 1977, a Notice of Appeal was filed on behalf of defendant-appellant, WILLIAM LAING, in connection with the instant appeal with the Clerk of the United States District Court for the Eastern District of New York.

This Brief is submitted on behalf of defendant-appellant, WILLIAM LAING, and is to be submitted on the original record.

B. Statement of Facts

Marvin Shelton was the initial government witness who testified at the trial. Shelton was convicted for burglary and a violation of probation on unrelated charges. He testified that in exchange for testifying on behalf of the government, the U.S. Attorney's office would inform the sentencing judge that Shelton had cooperated in the instant proceeding. Shelton further testified that he has been a drug addict since 1968 and supported his habit by stealing. Shelton stated that he was introduced to the co-defendant Edward Moore, through one "Jackie". Shelton further testified that co-defendant Moore instructed him to bring him (Moore) checks for which Moore paid Shelton fifty (50%) percent of the face value of said checks he delivered. Shelton also testified that he met Robert Lee Collins, another government witness in December, 1973, and in fact, they shared the same attorney. Shelton testified with the expectation that he would receive probation for the above referred convictions. He further testified he met Jacqueline Murphy in December, 1974. Shelton further testified that the source of the checks that he delivered to Moore was a corrupt postal employee as well as from his breaking into mail boxes. Shelton's arrangement with Moore continued up until certain checks failed to clear Moore's accounts. Upon application of Laing's trial counsel, the Court instructed the jury that Shelton's testimony was not binding on defendant William Laing.

Robert Lee Collins (also known as "Shasha") testified that he served six months on a burglary conviction and was cooperating with the government's case for favorable treatment. Collins also testified

that he, like Shelton, was a heroin addict and in addition forged checks to pay for his advanced heroin addiction. Collins further testified that he brought stolen checks to defendant Moore in exchange for one-half of the face value of those checks. Collins further testified that he also met defendant MOORE through his girlfriend "Jackie" and employed Jackie as a go-between, since he did not deal directly with defendant MOORE for most of his transactions. Collins also testified, like Shelton he obtained stolen checks subsequently given to MOORE by breaking into mail boxes and that either he or his girlfriend, Jackie, would endorse the names of the payees before delivering said checks over to MOORE. Again, as in the case of Shelton, Collins did not have any dealings with defendant LAING and accordingly, his testimony was not binding upon WILLIAM LAING.

The testimony of David Johnson, a detective for the Department of Investigation of the City of New York was required to introduce certain tapes to evidence.

The prosecution next called Jacqueline Murphy ("Jackie") who testified that she was on public assistance and although never arrested and that she too was "cooperating" with the United States Attorneys Office pursuant to agreement in connection with a pending misdemeanor charges lodged against her. Miss Murphy later testified that she received numerous stolen checks from the prior government witnesses, Shelton and Collins; that upon her receipt of the checks she would deliver said checks to the defendant MOORE in exchange for fifty (50%) percent of the face value of those checks pursuant to her agreement with MOORE. She also testified that she would forge the stolen checks with the names of the payees. Upon application by LAING's counsel,

the court instructed the jury that Miss Murphy's conversations with the prior government witnesses Shelton and Collins, in connection with the stolen checks, were not binding upon defendant WILLIAM LAING. Miss Murphy further testified that the source of the stolen checks were from corrupt mailmen and broken-into mailboxes. Upon notification by MOORE that MOORE was being "watched" Murphy ceased to bring any more stolen checks to MOORE. Miss Murphy also testified that she recognized MOORE's voice on the tape that was introduced into evidence and on cross-examination, additionally testified that should she cooperate with the United States Attorneys office she would not go to jail. As in the case of Shelton and Collins, there was no testimony offered by Miss Murphy had any type of relationship with WILLIAM LAING. Shelton, Collins and Murphy also identified several checks from the government's exhibits as being checks endorsed by them and delivered to defendant EDWARD MOORE in exchange for one-half the face value of said checks. In addition, it was the government's position that Shelton, Collins and Murphy were all accomplices of defendant EDWARD MOORE.

Antonia Riley next took the stand and testified that she was on public assistance and was a drug addict. She further testified that she knew Moore and Laing and that she worked for defendant Edward Moore in Moore's church as a secretary. Miss Riley also testified that she had an affair with Moore and that she would often accompany Moore to the Credit Union where Moore would make large deposits of checks contained in numerous bundles, some two to three inches in thickness, that Moore received through his church. Ms. Riley also testified that on an occasion she witnessed a

mailman delivering to Moore a batch of checks in Moore's office. Upon application by counsel, this meeting between the postman, Moore and others were not binding upon Laing. Ms. Riley further testified that when she inquired as to the source of the checks, Moore told her that she should not worry and he would not get into trouble and further he didn't put his name on any of the checks and that he had a good connection in the post office. She further testified that she accompanied Moore to the Credit Union where Moore met with Mr. Laing and that she spoke to Laing on the telephone and that Laing visited Moore at Moore's church. She further testified upon cross-examination that she was not present when Moore went into Laing's office and was not a party to the conversations, if any, that occurred, between Moore and Laing.

The next witness called by the government was Elvira Valentin who testified that she was a clerk-teller at the Credit Union. She testified that she recognized William Laing, and in addition, she also knew defendant Moore. She further testified that defendant Moore maintained three accounts at the credit union (a) his personal account (b) his health food store account and (c) the church account. She further testified that Moore made deposits at the Credit Union mostly every day and as part of her responsibility at the Credit Union Miss Valentin accepted the deposits. Miss Valentin later testified that the substantial bulk of the checks deposited by Moore were government checks either in the form of Welfare or Social Security checks and that she accepted these checks from Moore without Moore's personal endorsement, and that the mere endorsement of the account number was sufficient. Miss Valentin testified on cross-examination that she

began working for the Credit Union in 1971 and at that time met Mr. Laing. She further testified that William Laing trained her and spent substantial periods of time training her and that Mr. Laing also arranged for Miss Valentin to attend a credit union school to learn bookkeeping and accounting. Miss Valentin also testified that Mr. Laing made arrangements for her to attend Cornell University on a special program for additional training and that Mr. Laing's assistance in this area was not only limited to Ms. Valentin, but to other members of the staff as well. Ms. Valentin further testified that Mr. Laing instructed her to do a diligent job in keeping the records of the Credit Union. Ms. Valentin further testified that defendant Moore was depositing large numbers of checks in his account and that they were deposited by Moore and Moore alone, and not by Laing. That there came a time in 1974 when Mr. Laing informed Ms. Valentin that Moore's checks were "bouncing" and that she was instructed by Laing not to accept any more checks from Moore.

The Credit Union's senior bookkeeper, Ronald Remsen, was the next witness called by the prosecution. Mr. Remsen testified that Mr. Laing instructed the staff that third-party checks were to be endorsed by the person making the deposit. That the credit union policy directed, that with respect to a joint account, the two parties must agree to withdraw any monies at the same time. Mr. Remsen also testified that aside from Mr. Laing, Mrs. Annett Odum and Mr. Remsen had the authority, within the Credit Union, to authorize the issuance of a withdrawal check. Upon cross-examination this witness also testified that he met Mr. Laing when he began working at the Credit Union in 1970 and that prior to his hiring he had no formal experience

in either accounting or bookkeeping. He further testified that Mr. Laing was his superior and that from 1970 through the present Mr. Laing aided Mr. Remsen in terms of training him as a bookkeeper and as an accountant. Further, Mr. Remsen testified that Mr. Laing made arrangements for Mr. Remsen to receive additional education in this area and that further, Mr. Laing spent numerous hours trying to help not only Mr. Remsen but the community in general.

Mr. Remsen further testified that Mr. Laing devised the entire system of bookkeeping so as to establish a responsible accounting system. Mr. Remsen further testified that Mr. Laing gave instructions in connection with the clearing of in-town and out-of-town checks and that Government checks needed one week to clear before monies could be withdrawn on said checks. Mr. Remsen further testified that Mr. Laing gave him specific instructions in connection with the freezing of Mr. Moore's accounts. That further, Mr. Moore was not permitted to withdraw funds with respect to his account in the Credit Union.

Further Mr. Remsen testified that Mr. Laing noted on the ledger cards for the various accounts of Mr. Moore that no more withdrawals were to be made from these accounts. Mr. Remsen further testified that Mr. Laing had overall responsibility for some 3,000 accounts in the Credit Union and, upon redirect examination he again testified that Mr. Laing ordered accounts of Mr. Moore frozen. Various exhibits reflecting record keeping in connection with the Credit Union during the period of the alleged conspiracy, were introduced through Mr. Remsen.

A former member of the Board of Directors at the Credit Union, Dorothy J. DeVouse, testified that at a board of directors meeting of the Credit Union, Moore denied making a deposit of some 92 checks on a single deposit into his account, and that any checks Mr. Moore had in fact brought in he had endorsed. In addition, the witness testified that Mr. Moore made the statement that "if he burned, someone else would burn with him".

David Anthony, a Special Investigator, assigned to the Postal Inspection Service was the next Government witness. Mr. Anthony testified that he informed Mr. Laing that photostats of approximately 19 deposits of Social Service checks had been stolen and that Mr. Laing informed him that said checks were deposited through the account belonging to defendant, Edward Moore. This witness then testified that he advised Mr. Laing to watch the account and not to accept any more checks. Although he did not specifically order Mr. Laing to freeze the accounts in question. Mr. Laing then agreed to freeze said accounts.

The next Government witness was Inspector Joseph Fileccia, of the United States Postal Service who testified that he examined the Credit Union Ledger sheet in connection with three accounts of which MOORE was a party to, i.e., Account #1822, the personal account of EDWARD MOORE, Account #3050 (the joint account of Moore and William Laing, under the Universal Science Church of God), Account #3008 (a joint account of Mr. Moore and Mr. Laing in connection with a health food store). Mr. Fileccia testified as to a computation that he made that the total deposits into these account was \$194,064.64 and further,

that the total withdrawals with respect to these accounts totaled some \$177,494.57.

After the Government introduced pertinent testimony of Mr. Laing given before the Grand Jury on March 2, 1976, and on March 9, 1976, the Government then called two witnesses to establish that the checks which are the subject matter of this proceeding were deposited in the mails during the regular course of business of various City and Federal Government Agencies. Lawrence Folkes testified that he is employed by the New York City Department of Social Services as a Special Investigator and that the City checks were mailed in the ordinary course of the Department's business. Bernard O'Kane, an employee of the United States Treasury Department next testified. Mr. O'Kane testified that he was the staff assistant to the Director of the Philadelphia Disbursing Center and that various federal agency checks, i.e., social security, veterans, internal revenue service were printed and mailed through the disbursing office to which he is affiliated with.

Before the Government rested, a stipulation of handwriting was offered into evidence and established that Moore wrote his signature in the "Received by Boxes" on some 33 checks and some 83 check stubs.

Defendant Moore's Case

Defendant Moore testified on his own behalf and denied in almost totality the testimony of the Government witnesses. Moore denied ever receiving checks from Shelton. He admitted knowing Jacqueline Murphy and testified that he only saw Robert Lee Collins on

one or two occasions. Moore denied in total any knowledge whatsoever that the three accounts maintained at the Credit Union were being used in any manner wherein large numbers of stolen checks were being passed. He further denied paying Shelton, Murphy and Collins 50% of the face value of checks received by them.

Moore further testified that he signed many bank items while blank at the request of Laing and that he relied upon Laing to maintain his financial records.

Appellant William Laing's Case

Defendant, William Laing, took the stand and testified in his own behalf. William Laing testified that he lived in Brooklyn since 1957 with his wife and family consisting of four (4) children. After graduating high school, Mr. Laing testified that he attended a cooperative college in England and became interested in the cooperative movement throughout the world. Mr. Laing defined the cooperative movement as a movement that started in 1944 where people got together and organized themselves together to solve their own problems by a mutual effort. Mr. Laing then testified that he was involved in prior cooperative movements consisting of fishing cooperatives and housing and farming cooperatives. He earned a college degree from Adelphi University. The witness then testified that he had never been arrested or convicted of a crime prior to the instant proceeding and was 53 years of age.

Mr. Laing then testified that he resided in Brownsville to involve himself in a cooperative movement in an attempt to solve the problems of the community relating to over-population, delinquency,

drugs and crime. Mr. Laing further testified that he originally began working in the Credit Union as a writer of programs and was further involved working as a director of planning for the Brownsville community which included the Credit Union. The witness testified that in approximately 1970 he became the manager of the Credit Union and at that time there were approximately five other employees of the Credit Union consisting of Mrs. Odum, Mr. Remsen, Mrs. Martinez, Elvira Valentin and Mr. Webb. In addition Mr. Laing testified that he taught accounting procedures to others.

The witness further stated that in 1971 he met the co-defendant, Edward Moore, and became a member of the Credit Union. Mr. Laing emphatically denied entering into any type of unlawful agreement with Mr. Moore to fence stolen checks through the Credit Union. He further testified that in early 1974 he entered into a legitimate business relationship with Mr. Moore with regard to a health food store which Mr. Moore maintained. Additionally, Mr. Laing testified that he entered into an additional relationship with Mr. Moore with regard to the Church. Thereafter, joint accounts were opened up for the health food store and the Universal Science Church of God and Mr. Laing testified that he executed his signature as an incorporator on the signature card when the account was opened as an incorporator. At that time, Mr. Laing testified that he thought Mr. Moore to be a progressive man and a leader in the community who had a certain flare about him. Mr. Laing denied ever making deposits in Account #1822 which was Moore's personal account. In addition, Mr. Laing testified that he never made deposits in account #3050 which was the Church account, but he did on occasion make deposits in Account #3008, which

was the health food store account. In addition, Mr. Laing further testified that he invested a little over \$3,000.00 in the early part of 1974 with respect to the health food store but has never received a return on his investment. Some time in 1974 Mr. Laing testified that problems cropped up with Account #1822 in that bad checks were being returned. There came a time when Mr. Laing was contacted by a postal inspector to "watch" Account #1822. In May 1974, Mr. Laing's father died and Mr. Laing left for Jamaica for his father's funeral. At approximately that time, in 1974, Mr. Laing testified that he ordered Mr. Moore's accounts frozen due to the fact that "bounced" checks were being returned through that account.

William Laing testified that on no occasion did he ever ask defendant Moore to fill out any of the Credit Union receipts, in blank. The witness further testified that some time in 1972 or 1973 defendant Moore personally borrowed money from William Laing and that said debt was repaid. Mr. Laing further testified that before the witness left for Jamaica for the funeral of his father, he froze the accounts Mr. Moore was involved with and that on or about June 26, 1974, William Laing testified that he voluntarily appeared without counsel before the Department of Investigation and gave them a statement.

William Laing testified that at no time was he ever involved in a check cashing scheme with Mr. Moore or with anybody else. Mr. Laing later found out that certain accounts of which defendant Moore was involved with had been the conduit through which stolen checks had been passed.

During the Assistant U.S. Attorney's cross examination of William Laing, the prosecutor launched a series of devastating and

prejudicial questions and statements that so severely hampered Mr. Laing, as set forth in Point II, below, that it denied Mr. Laing a fair trial and it is respectfully submitted that reversal is in order. William Laing, during his cross examination was stripped of his presumption of innocence which is guaranteed by the United States Constitution so as to deprive William Laing of the fair trial that he is constitutionally guaranteed to have.

As set forth below in Point I, a juror stated on the record of his disagreement with the apparent "unanimous" verdict announced by the jury. For the reasons set forth below, it is again respectfully submitted that the conviction, must in the interests of justice, be reversed.

POINT I

THE TRIAL COURT ERRED WHEN IT INTERROGATED A NONCONCURRING JUROR DURING A JURY POLL RATHER THAN ORDERING FURTHER DELIBERATION OR DISMISSING THE JURY.

It is a basic tenet of the criminal law in the United States that a defendant has the right to have his guilt or innocence determined by a jury. As announced in United States v. Thomas, 449 F.2d 1177, 1181 (D.C. Cir. 1971):

Every defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude. (Emphasis added).

To insure that the right of trial by jury and its attendant unanimity requirement is more than just mere words all parties to an action, as well as the court on its own motion, have the right to poll the jury subsequent to the announcement of the verdict. Authority for polling a juror in a federal criminal case is clearly established by Rule 31(d) of the Federal Rules of Criminal Procedure:

Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion....

The object of polling a jury is:

To give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror

has been coerced or induced to a verdict to which he has not fully assented.

Miranda v. United States, 255 F.2d 9, 16 (1st Cir. 1958); Humpries v. District of Columbia, 174 U.S. 190, 194, 19 S.Ct. 637, 43 L.Ed. 944 (1899).

Thus, if during a poll a juror indicates his doubts or dissents from the verdict as in the case at bar, the trial judge should be alerted to the probability that there may not be unanimity in the verdict. United States v. Edwards, 469 F.2d 1362 (5th Cir.1972). In such a situation "it is both unwise and undesirable that the Court should enter into an argument with a juror or require an explanation of his change of position." Bruce v. Chestnut Farm-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942); United States v. Sexton, 456 F.2d 961, 966 (5th Cir. 1972). The obvious undesirability stems from the fear that in so questioning a dissenting juror a court may inadvertently create a coercive atmosphere which causes a substantial propensity for prying a juror loose from beliefs he honestly holds. If such was the case, a defendant's due process would obviously be violated as the trial judge would have improperly invaded the exclusive province of the jury.

The safe procedure for dealing with a non-unanimous jury discovered during a jury poll is laid out in Rule 31(d) of the Federal Rules of Criminal Procedure:

If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

As further stated in the United States v. Edwards, supra at 1367:

where a poll indicates a lack of unanimity the trial court must re-

frain from attempting to extract unanimity by questioning from the bench and must either order the jury to retire for further deliberations or dismiss them. (Emphasis added).

It is this appellant's contention that the trial judge in the instant proceeding clearly violated defendant Laing's due process, and hence committed reversible error, when he questioned a dissenting juror, at length, during the jury poll. At bar, subsequent to the forelady's announcing that the jury found defendant Moore guilty on all eleven counts and defendant Laing guilty on seventeen counts as originally charged, defendant Laing's attorney requested a jury poll. When the court clerk inquired of juror number 3 if that was his verdict, the juror responded:

It is, yes. It is, but I still have a little reservation (Trial Transcript, p. 1352). (Emphasis added).

At this point, pursuant to proper procedure, the trial judge should have become alert to the fact that the jury may have, or indeed, lacked unanimity. However, rather than returning the jury to the jury room for further deliberation the trial judge incorrectly refused to recognize one of the attorneys for the defense and began to question juror number 3 as follows:

MR. PATTON:* Wait.

THE COURT: No.

You see, the Court advise you that you must bring in a verdict and your verdict must be brought within your own good conscience and it be unanimous. If that is not your verdict, then you must

* Counsel to Mr. Moore.

announce that it is not your verdict. And then the Court does not have a verdict and must send you back to deliberate.

MR. PATTON: May we have a conference with this one juror?

THE COURT: No. No. I will permit this.

MR. PATTON: Obviously, there's been a reservation stated here as the Court --

THE COURT: Well, you heard the counts -- The numbered counts called in reference to both the defendant Moore and the defendant Laing. With those announcements by the Forelady of the jury as to the guilt of each and every count, was that your verdict? Was that your verdict?

JUROR NO. 3: Yes.

THE COURT: Is it your verdict now?

JUROR NO. 3: No.

(Trial Transcript, p. 1532-1533)..
(Emphasis added).

When juror number 3 flatly responded that this was not his verdict the trial judge erred when he neither dismissed the jury nor sent them back for further deliberation. Federal Rule of Criminal Procedure 31(d); United States v. Lee, 532 F.2d 911 (3rd Cir. 1976). In addition, the trial judge compounded his error by continuing to interrogate juror number 3:

THE COURT: You mean after listening to it in Court you have changed your mind?

JUROR NO. 3: That's correct.

THE COURT: Was it at the time that you made your verdict in the jury room -- Did you at that time intend to make it

unanimous or were you compromising your position?

JUROR NO. 3: I had a -- At that time intended to make it my verdict. But after we had voted on it and thought about it a little more, I have changed my mind.

THE COURT: Well then, you feel that you need more time to come to a conclusion?

JUROR NO. 3: On at least two of the counts.

THE COURT: Will you announce to the Court which of the two counts?

What you are saying, the other counts, that would be your verdict?

JUROR NO. 3: Yes, sir.

THE COURT: Will you now announce to the Court which of the two counts you say that you still have reservations and is not your verdict at this point.

JUROR NO. 3: First of all, as to the first count, and I have to look at the indictment to reach -- To see which is the second one.

THE COURT: First and second count?

JUROR NO. 3: The first count.

THE COURT: All right. You may look at the indictment. First count.

(Whereupon, the indictment was handed to Juror No. 3).

JUROR NO. 3: Thank you.

MR. KRINSKY*: Could we have a sidebar?

THE COURT: Just one moment until I finish with him. And then I will give

* Counsel to Mr. Laing.

you a sidebar conference. I am doing nothing at this point.

JUROR NO. 3: Count eight.

THE COURT: What you are saying now is all of the other counts which the verdict was announced, that that is your verdict?

JUROR NO. 3: Yes.

THE COURT: And that you unanimously agreed with your fellow jurors that that is your verdict?

JUROR NO. 3: Yes.

THE COURT: Except as to counts one and eight? You say that is not your verdict at this time?

JUROR NO. 3: That's correct.

(Trial Transcript, p. 1533-1535).

It is defendant-appellant Laing's contention that the trial judge's errors were not remedied by the fact that the jury was subsequently sent back to redeliberate and came back with a unanimous guilty verdict. After it became apparent that the jury lacked unanimity, undoubtedly, the trial judge, by his words and action, created an atmosphere under which the jurors may have well been coerced into surrendering views they conscientiously entertained. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971). Thus, the subsequent deliberation of the jury and its final unanimous verdict was so tainted as to violate and deprive defendant Laing's right to a jury trial.

Additionally, the trial court further compounded the error when the court limited the jury's redeliberation to only the first and the eighth counts. Although juror number 3 stated these were the only counts in which he did not concur in the verdict, in the interest of

justice and fairness to the defendant, the trial judge should have ordered a redeliberation of the entire case. Obviously the trial judge reasoned the court was justified in accepting the verdict as to all the other counts as no other juror during the poll raised any other objections. However, as jurors "4" through "12" were polled subsequent to the colloquy between the court and juror "3", those jurors were obviously responding under the coercive and persuasive influence which had already invaded the court room by that time.

As set forth in footnote 5 in United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972):

[t]here is a limited exception to the bar of questioning from the bench during a jury poll. This exception involves cases where it is apparent that the juror is confused about the questions asked during the poll or where a juror's dissent has resulted from inadvertent slip of the tongue.

Neither of these exceptions are applicable to the facts of this case.

In United States v. Sexton, supra at 962, which was a factually similiar case to this case, a juror responded to the poll by stating that "I didn't vote either way." The Court then inquired, "Well, is it your verdict?" to which the juror replied "Yes, sir." At this point the Court ordered the jury to retire for further deliberation, after which another poll showed that the verdict was unanimous. The Court of Appeals for the Fifth Circuit in reversing the conviction in Sexton stated, in pertinent part:

If the Court had simply stated that the verdict could not be accepted because it was not unanimous and had returned the

jury for further deliberation [rather than questioning the dissenting juror and requiring her to vote publicly in open court] there would have been no error.

The trial judge in the instant case went considerably further than the trial judge in Sexton when confronted with a dissenting juror. At bar, the court's actions improperly interfered with the proper functioning of the jury thereby clearly requiring a reversal of the instant conviction.

POINT II

THE COURT ERRED IN NOT GRANTING A MISTRIAL NECESSITATED BY THE U.S. ATTORNEY'S REPEATED PREJUDICIAL QUESTIONS AND REMARKS MADE IN THE PRESENCE OF THE JURY.

As guaranteed by the United States Constitution, a defendant in criminal prosecution has the fundamental right to have his guilt or innocence determined by a jury. Sixth Amendment, United States Constitution; Federal Rules of Criminal Procedure 23(a). Inherent in any criminal prosecution is the presumption of innocence which a defendant is entitled to until overcome by proof beyond a reasonable doubt. Litiethal's Tobacco v. United States, 97 U.S. 237 (1877); Morisette v. United States, 342 U.S. 246 (1952). Thus, defendant-appellant Laing was entitled to a presumption of innocence before and during his trial and any attempt by the prosecuting attorney to vitiate this right would result in a denial of Laing's due process that is ordinarily afforded him.

During the course of trial the prosecuting attorney began to inquire of defendant-appellant LAING as to his knowledge and involvement in the alleged check fencing scheme covering the instant indictment. By the very nature of the questions posed, the U.S. Attorney clearly implied that the existence of the alleged check fencing scheme had already been established as fact:

Q: He [co-defendant Moore] in fact succeeded in getting you into it right in the middle of his check fencing operation.

(Trial Transcript, p. 1087).

This question was timely objected to and said objection was properly sustained by the Court as the existence of the alleged check fencing scheme was clearly the ultimate question of fact for the jury, and not the prosecuting attorney, to determine. Although the question implied that Laing was subsequently drawn into co-defendants Moore's already existing illegal operation, the effect of such questions was no less prejudicial to Laing because both defendants were being tried for conspiracy.

Thus, the prejudicial effect incurred by co-defendant Moore due to the improper and critically prejudicial questions which implied the prosecuting attorney's own belief and determination of the existence of the check fencing operation, inured to defendant Laing as he was charged with conspiring with Moore. Hence, this line of questioning impinged on defendant-appellant Laing's right to a jury trial and his presumption of innocence that is undoubtedly his.

Despite the fact that the defendants' objections to said questions were being continually sustained, the United States Attorney persisted in this line of questioning. See Trial Transcript, p. 1093-1096. In fact, at one point the trial judge admonished the prosecuting attorney that he was "presuming the very fact that the jury must find beyond a reasonable doubt ..." (trial transcript, p. 1095).

In an effort to overcome the prejudicial effect of the prosecuting attorney's questions, the court did instruct the jury on the presumption of innocence (Trial Transcript, p. 1099-1100). However, defendant-appellant Laing contends that this preliminary instruction to the jury was ineffective in dispelling the prejudice wrought by the

prosecuting attorney. As noted by the Supreme Court:

It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations [obligations of integrity, fairness and impartiality] which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88 (1934).

The prosecuting attorney further compounded the prejudicial effect brought to bear on defendant Laing when he posed an extremely loaded question to Laing:

Q: Wasn't it a little like Willie Sutton asking J. Edgar Hoover for a lift to the nearest bank? (trial transcript, p. 1095)

Equating the defendants with that of an infamous criminal went far beyond the bounds of proper prosecutorial conduct. As stated in Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969) in reversing the conviction of an appellant who was described at trial by the prosecuting attorney as a "hoodlum":

This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises-succinct, pithy, colorful, and expressed in a sharp break with decorum which the citizen expects from the representative of his government.

Although the trial judge stated that the question posed by the Assistant United States Attorney was a "bad question", the Court further failed to curb its prejudicial effect by directing it to be stricken from the record and for the jury to disregard it. The trial judge seemed to dismiss the fact that the reference to Willie Sutton and J. Edgar Hoover in that context would have any prejudicial impact because he expressed his doubts that the jury even knew who these individuals were (trial transcript, p. 1095). Defendant-appellant LAING respectfully submits that the trial judge underestimated the notoriety of Willie Sutton and J. Edgar Hoover.

The standard of conduct for a prosecuting attorney has been clearly set forth by the Supreme Court:

He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, supra at 88.

Defendant-appellant LAING respectfully submits that the prosecuting attorney's questions and remarks so severely prejudiced him as to prevent a fair trial to which he was entitled. The court's attempt to lessen the prejudicial effect of the prosecuting attorney's action was ineffective. Hence, in the interest of justice and fair play and for the reasons set forth above defendant's conviction must be reversed.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the conviction of the defendant-appellant, WILLIAM LAING, be in all respects reversed.

Dated: New York, New York
September 19, 1977.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
 :
Respondent, : AFFIRMATION OF SERVICE
--against-- :
 : Docket No. 77-1233
 :
WILLIAM LAING, :
 :
Defendant - :
Appellant. :
----- X

The undersigned attorney, duly admitted to practice in the courts of the State of New York, affirms the following to be true pursuant to CPLR 2106, under the penalties of perjury:

1. That he is a member of the Bar of this Court and attorney of record for defendant-appellant.

my 2. That on the ^{21st}~~19th~~ day of September, 1977, your affirmant served the within Brief for William Laing,

my upon U.S. Attorney for the Eastern District of New York (2 copies), and John Patten (2 copies)

attorney(s) for Respondent, and Edward Moore, respectively.

at 225 Cadman Plaza East, Brooklyn, New York 11201
and, 80 Broad Street, New York, New York

the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same to each attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

my Dated: September ²¹~~20~~, 1977
New York, New York.

Martin E. Fiel

MARTIN E. FIEL